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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 370.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

DANIEL T. JACKSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Brief for the Respondent

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IN THE

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QUESTIONS PRESENTED.

The primary question **now** presented to this Court by the petitioner, and the sole question discussed by the amicus curiae is **not** the question upon which certiorari was requested, nor the question presented to the Court below. Petitioner's argument to the Court below presented the single question as to whether or not the Section 6 exemption applied. Its Petition for Certiorari presented **only**

this same question. In its brief before this Court, this question has now been relegated to a secondary position and its principal argument now is that the cars here involved are not "cars" within the scope of the Safety Appliance Acts. This, furthermore, is the sole position taken by the Commission in its brief.

As now presented, if this Court will consider the new issue raised, the questions are:

1. When a track motor car is used to haul a push truck on a railroad, are they "vehicles" within the meaning of the Safety Appliance Acts?

2. Are a motor car carrying men and a push truck carrying equipment exempted from the requirements of the Acts by the proviso of Section 6?

STATUTES INVOLVED.

The full texts of Sections 1, 2, 6, 8, 11 and 23 (Safety Appliance Acts and Boiler Inspection Act) are printed in Appendix A to this Brief.

COUNTER-STATEMENT OF THE CASE.

Respondent, now 71 years of age, had been in the employ of the petitioner for 46 years. For 39 years he had been a section foreman of track maintenance and had been operating motor cars for 34 years (R. 21). He was responsible for the maintenance and repair of a section of defendant's track between Waring and Deerwood, Maryland. Under his supervision were a crew of men and a variety of equipment, e. g. bars, wrenches, track wrenches, hammers, shovels, etc., including a motor car and truck.

On November 1, 1951, respondent and his crew had been ordered by his supervisor to take a load of coal to the station-master at Washington Grove and to work a section of the westbound track approximately 390 feet from the Station. At "quitting time" the crew loaded the truck with tools and equipment to return to Gaithersburg where the motor car and truck and other equipment were stored pursuant to instructions from their supervisor and in compliance with the rules and regulations of the petitioner.

The motor car was a Mudge belt-drive engine, powered with a gasoline motor, equipped with a hand-brake operating on iron brake shoes. The loaded truck which it was to pull weighed about half a ton and was not equipped with any brakes at all (R. 23). The motor car had no brakes which could control the truck which it was pulling (R. 23).

Respondent and his crew pushed the motor car and truck onto the west-bound tracks, started the engine and climbed aboard for the return trip. From a standing start they traveled "about 195 feet" to the point where the vehicles overturned (R. 26, 31). They were traveling "around about 5 to 10 miles an hour" (R. 32) when a dog ran across the tracks from the station on respondent's left. When respondent first saw the dog running, it was at about the first rail of the east-bound track (R. 27, 51). Respondent "grabbed the brake back with everything (he) had" (R. 27). The brakes on the motor car applied and the car and truck skidded about 39 feet before it struck the dog and derailed (R. 28) throwing the respondent into a ditch and causing his injuries. Respondent's uncontradicted evidence was that the motor car (without the truck) could have been stopped under the same conditions within 6 to 8 feet (R. 32) but that he was unable to stop the car and truck before it had gone 39 feet and overturned (R. 28).

Petitioner did not produce a single qualified motor car operator to contest respondent's testimony. It did produce evidence that the motor car here involved is substantially the same as the type customarily used in the industry and

that approximately sixty thousand are in use (R. 78). It also produced evidence that the truck here in use was substantially the same as the type customarily used and that these trucks "are capable of being towed" by motor cars (R. 78). Not a word of evidence, however, was produced to prove that at any other time or place did any other railroad use or permit a motor car to pull a truck without brakes.

Respondent also produced an "expert" witness who admitted that the weight of a following vehicle which had no brakes would lengthen the stopping distance of the motor car (R. 69, 70).

The trial, before Honorable Jennings Bailey and a jury, resulted in a verdict for the respondent in the amount of $15,000.00 upon which judgment was entered. Petitioner's argument that the vehicles involved were exempted from the requirements of the Safety Appliance Acts[1] by the proviso of Section 6[2] was rejected three times by the District Court and by the Court of Appeals in affirming the judgment. Petitioner applied for certiorari on the same issue, asserting a conflict between the decision of the court below and a prior decision of the Second Circuit. This Court granted certiorari (352 U. S. 889).

SUMMARY OF ARGUMENT.

I. The writ should be dismissed as having been improvidently granted. The question here presented is not that upon which petitioner relied in the courts below or in its Petition for Certiorari; it is a broad question which should not be determined by this Court in a private litigation.

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[1] 45 U. S. C. 1, 2, 6, 8, 11 and 23 quoted in full in Appendix A.
[2] 45 U. S. C. 6, Appendix 1a.

II. The Safety Appliance Acts are applicable to the vehicles here involved. This conclusion must be reached whether we construe the statute by accepting the ordinary meaning of its words, consider it in the light of its purpose, or view its judicial history.

III. Administrative interpretation is not the guidepost to its construction. The argument for such construction is based upon fundamental fallacies and it is refuted by the Commission's own decision. The petitioner's position is not supported by the Commission's failure to regulate, the existence of State regulations, or the failure of Congress to amend the statute. There are no practical considerations which support the argument.

IV. The proviso of Section 6 does not exempt these vehicles. Grammatically read, there is no exemption. Strictly construed, the exemption cannot apply. The courts have unanimously so construed the section. Legislative history supports the court below. Section 23 does not contain any exemption.

ARGUMENT.

I.

The Writ Should be Dismissed as Having been Improvidently Granted.

Throughout the long history of this case, petitioner has stood upon a single point; that the proviso of Section 6 exempts the four-wheeled vehicles here involved. In support of its motion to strike twice urged upon the District

Court, and in its motion for new trial[3] this was the issue raised. In its brief on appeal to the Court of Appeals, it stated the QUESTION PRESENTED as follows:

> "1. Are four-wheel railroad motor track cars and push trucks exempt from the Safety Appliance Act, 45 U. S. C. §1 et seq., in view of the provision of 45 U. S. C. §6 which provides in part:
>
> "* * * Nothing in this Act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars, * * * or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs."

In the same brief,[5] its STATEMENT OF POINTS reads:

> "1. Section 6, 45 U. S. C. §6, of the Safety Appliance Act excludes from the coverage of that Act four-wheel motor track cars and push trucks."

In its Petition for Certiorari, the question presented to this Court[6] was:

> "The provisions requiring the use of specific safety appliances on railroad equipment are contained in sections 1-7 of the Safety Appliance Act, 45 U. S. C. §1 et seq. Section 6 of the Act provides in part:
>
> '* * * That nothing in sections 1-7 of this title shall apply to trains composed of four-wheel cars or

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[3] The motions and briefs are not made part of the printed record. but the Orders thereon appear at R. 13, 16.

[4] Front page.

[5] Page 12. The summary of its argument in this brief reads as follows (page 21):

> "The short of the matter is that the language of the statute excludes all four-wheel cars from its coverage; and, not only the agencies responsible for enforcing the statute, but more than half of the states have consistently interpreted it as not being applicable."

[6] Page 2.

to trains composed of eight-wheel standard logging cars, * * * or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.'

"In view of this express exemption, is the Safety Appliance Act applicable to four-wheel railroad motor track cars and push trucks?"

It there asserted the existence of a conflict between the decision of the Court below and the prior decision of the Second Circuit[7] on this point. Mature consideration of this issue will disclose that there exists no actual conflict. Every appellate court decision dealing in any way with this provision of the Act[8] is in conformity with the decision below.

In its present Brief, petitioner has relegated this question to a secondary, make-weight position and fails completely to meet the decision below.[9] Instead, it presents a new and immensely broader issue, the resolution of which will allegedly produce "serious practical problems" for the entire railroad industry.

The Interstate Commerce Commission, in its amicus curiae brief in support of the petition, did represent that important issues vital to the industry were involved in this case. These issues are no more vital today than they were twenty years ago when this Court denied certiorari in the *Hoffman* case[10] or last year when it denied certiorari in the *Martin* case,[11] both of which properly raised these issues.

Although there is little common ground upon which we stand with the petitioner in its argument here, with one point we are in complete accord.[12] This private litigation between a 71-year old employe and his employer is not the

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[7] Page 10.

[8] See page 16 of this Brief.

[9] See pages 32-34 of this Brief.

[10] **Hoffman v. New York, N. H. & H. R. Co.**, 74 F. 2d 227, cert. den. 294 U. S. 715.

[11] **Martin v. Johnston**, 79 So. 2d 419, cert. den. 350 U. S. 835.

[12] Petitioner's brief, page 35.

type of proceeding in which this Court should decide an issue so far-reaching as petitioner and the Commission would now make it out to be. In the light of all prior appellate proceedings involving these vehicles, the Commission should initiate a proceeding to standardize and regulate the equipment of maintenance of way vehicles.[13] The Writ of Certiorari in this case should be dismissed as having been improvidently granted.

II.

The Safety Appliance Acts are Applicable to the Vehicles Here Involved.

Complete discussion of the new issue now raised is necessitated by the extensive argument made and the minutely documented data gathered in both briefs. All of this is presented in order to create an impression that there is ambiguity in the statutes where none exists and to have them construed on the basis of legislative history and administrative interpretation.

The Courts below have held that where the motor car was used to pull the push truck the petitioner was required "to have brakes on the motor car controlling the brakes on both the truck and the motor car" (R. 74). The decisions below are based upon the Safety Appliance Acts which require "appliances for operating the train-brake system" on "all trains, locomotives, tenders, cars and similar vehicles"[14] and that "all parts and appurtenances" of locomotives be "in proper condition and safe to operate in the service to which the same are put".[15] Petitioner claims that these statutes should be interpreted to exclude the vehicles here involved from their terms.

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[13] As it did in connection with electrically operated motor cars in **Ex parte No. 179, 297 I. C. C. 177**, discussed infra, page 23.

[14] 45 U. S. C. 1 and 8, Appendix 1a, 2a.

[15] 45 U. S. C. 23, Appendix 3a.

A.

The Meaning of the Words Used Requires Coverage.

Interpretation of any statute begins with the language of the statute—the ordinary and customarily accepted meaning of the words used.[16] There is no doubt (and the contrary is not here argued) that, as so construed, the Acts cover the vehicles involved in the instant case. A motor track car and a push truck are "cars" or "vehicles" as those terms are usually defined. A "car" is defined in Webster's New International Dictionary (2nd Ed., 1950) as "a vehicle adapted to the rails of a railroad." This principle of construction was early adopted in relation to these Acts soon after their passage. In *Johnson v. Southern Pac. Ry.*, 117 Fed. 462, the Circuit Court had narrowly construed the original Act so as to hold that a "locomotive" was not a "car." This Court reversed (196 U. S. 1) upon the principle here contended for, saying (196 U. S. 15-16):

> "And manifestly the word 'car' was used in its generic sense. There is nothing to indicate that any particular kind of car was meant. Tested by context, subject-matter and object, 'any car' meant all kinds of cars, running on the rails, including locomotives. And this view is supported by the dictionary definitions and by many judicial decisions, some of them having been rendered in construction of this act."

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[16] The prime rule of statutory construction is that its words should be given the meaning they would evoke in the common mind.

> "For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense. * * * After all, the legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."
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> **Donnell v. United States**, 229 F. 2d 560, 562, quoting **Addison v. Holly Hill Fruit Products**, 322 U. S. 607, 617.
>
> Cf. **Rayonier, Inc. v. United States**, —— U. S. ——, 1 L. Ed. 2d 354, 357, 25 L. W. 4107.

Supporting this holding, this Court cited seven state court decisions. Of these, **three** specifically applied to **hand** cars. *Kansas City etc. Railroad Company v. Crocker*, 95 Ala. 412, held that a hand car, such as is in general use on railroads in maintenance of way work, came within the terms of a statute giving an action for injuries by reason of the negligence of any person who has charge of "any signal, points locomotive, engine, switch, **car**, or train upon a railway." It stated (95 Ala. 422):

> "It is not difficult to select from the several definitions of the word 'car', as found in the dictionaries, one which is applicable to the word as used in the statute. The Century Dictionary gives this, among other definitions: 'a vehicle running upon rails.' One of Webster's definitions is: 'a vehicle adapted to the rails of a railroad.' We find nothing in the language of the statute to suggest that the word as there used was intended to convey a meaning which excludes the idea of a hand or lever-car. Such cars are used in the ordinary business of railroads. Employees who ride upon them, or who are in the discharge of duties on or near to tracks over which they are propelled, are liable to be injured in consequence of the negligent handling of them. It is plain that sub-division 5 of the statute covers the case of an injury caused by reason of the negligence of a co-employee who has the charge or control of a car, though such car is at the time in no way connected with an engine, and is not a part of a train. The negligent handling of a detached passenger or freight car may cause an injury which is actionable under the statute. It is not necessary that the car be connected in any way with a locomotive, or with other cars forming a train. If the car is adapted to the rails of a railroad, and is used in the business of railroads, we think that it is none the less within the meaning of the word as used in the statute because it is made to be propelled by hand."

In *Thomas v. Georgia Railroad & Banking Company*, 38 Georgia 222, the statute created a cause of action for persons injured by a railroad "in or by the running of the cars or engines." The Court there held that an injury sustained by the running of a hand-car was within the terms of the statute.

In *Benson v. Railway Company*, 75 Minnesota 163, an employee operating a hand-car was held to be within the coverage of a statute relating to persons "operating, running, riding upon or switching passenger or freight or other trains, engines or cars."

In addition to these cases cited with approval by this Court, the courts of last resort of other States have consistently held that the word "cars", under similar circumstances, includes "hand-cars":

Boyd v. Missouri Pac. Co., 155 S. W. 13, 249 Mo. 110;

Texas & P. Ry. Co. v. Hervey, 89 S. W. (Texas) 1095;

and "push cars":

Seery v. Gulf, C. & S. F. Ry. Co., 77 S. W. 950 (Texas);

Texas & P. Ry. Co. v. Webb, 72 S. W. 1044 (Texas).

Soon after the decision in the *Johnson* case, the status of a shovel car under the Act was brought into question in *Schlemmer v. Buffalo, Rochester & E. Ry.*, 205 U. S. 1. Again this Court construed the language of the Act in its generic sence and broadened its coverage.

Petitioner's argument has been rejected by this Court with reference to the Air Brake Act. In *Spokane & Inland R. R. v. Campbell*, 241 U. S. 497, the railroad contended that an electrically operated train was not within the Act, particularly because of the use of the terms, "locomotive engine", "locomotives". It relied upon the same argument as here presented: the use of words, "locomotives", "engines", etc. and the absence of any legislative or Commis-

sion discussion of electric trains. Rejecting this construction, this Court said (241 U. S. at 507):

> "Of course, an important object of having a train equipped with a system of brakes under the single control of the engineer is to permit of a prompt and effective reduction of speed when the man driving the train is notified of danger. **The importance of this is precisely the same whatever be the motive power,** and in view of the beneficial purpose of the Act and the evident intent of Congress to enlarge its scope so far as necessary to guard against the dangers in view, the term 'similar vehicles' must be held to have the effect of bringing electric motors and trains drawn by them within the provision respecting power or train brakes." (Emphasis supplied.)

Only an extremely narrow and unrealistic interpretation of the words of the statute would exclude these vehicles from its coverage. Such an interpretation would violate every precept laid down by the Courts in construing the statute.[17]

B.

Liberal Construction in the Light of the Purpose of the Acts Requires Coverage.

Consistently in every case coming before this Court the language of the Acts have been construed broadly and liberally to effect the safety of railroad employees in whatever field they may be working. It has been aptly stated that great statutes are empty vessels into which the judges pour the wine of meaning. Equally, by inhospitality of construc-

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[17] In the case of **Railroad Commission v. Chicago, B. & Q. R. Co.**, 257 U. S. 563, 588-589, this Court declared that extraneous aids "are only admissible to solve doubt and not to create it."

tion, the Courts have the power to constrict the scope of a law's applicability so narrowly that it may become an empty container of no practical use.

In *Lilly v. Grand Trunk W. R. Co.*, 317 U. S. 481, this Court said of the Boiler Inspection Act (317 U. S. 486):

> "The Act, like the Safety Appliance Act, is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment."[18]

Every attempt to obtain from this Court a narrow construction of these Acts has met with failure. A glance at some of these decisions is illuminating.

In *O'Donnell v. Elgin, J. & E. R. Co.*, 338 U. S. 384, this Court was asked to review a decision holding that the breaking of a coupling did not constitute a violation of the Coupler Act, (45 U. S. C. 2)[19] which, by its terms, required *only* couplers which coupled automatically by impact and could be uncoupled without requiring men to go between the ends of the cars. Rejecting this narrow construction and reversing the court below, this Court said (338 U. S. at 388-389):

> "The Act so construed would guard against dangers incident to effecting an engagement or disengagement while ignoring the even greater hazards which can result from the failure of a coupling to perform its main function, which is to stay coupled until released."

In *Coray v. Southern Pacific Co.*, 335 U. S. 520, the court below had held that a leak in the brake line of a train which caused it to stop did not constitute a violation of the Air

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[18] Typical of many similar statements is that made by the Eighth Circuit in **Chicago M. & St. P. Ry. Co. v. Voelker**, 129 Fed. 522:

> "Obviously the purpose of this statute is the protection of the lives and limbs of men, and such statutes, when the words fairly permit, are so construed as to prevent the mischief and advance the remedy."

[19] Appendix A, page 1a.

Brake Act (45 U. S. C. 1)[20] because the object of the Act was to protect employees from the dangers of moving and not standing trains. Again rejecting this narrow construction and reversing the court below, this Court said (335 U. S. at 522):

> "We do not view the Act's purpose so narrowly * * *. An abrupt or unexpected stop due to bad brakes might be equally dangerous to employees and others as a failure to stop a train because of bad brakes."

In *Brady v. Terminal R. Assn.*, 303 U. S. 10, the court below had held that an inspector looking for defects in a car, who was injured when a grab iron broke, was not within the protection of the Act (45 U. S. C. 11).[21] Again refusing this narrow construction and reversing the court below, this Court held that the inspector was within the protection of the Act "although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection," (303 U. S. at 15) and that the broad purpose of the statute required a holding that its protection was not to be determined by "the position the employee may be in or the work he may be doing at the moment when he is injured" (303 U. S. at 16).

Broad construction of the statute and its operative companion, the Federal Employers' Liability Act (45 U. S. C. 51 etc.) was seriously contested when their application to a case involving silicosis first came before the courts. Again reversing the court below in *Urie v. Thompson*, 337 U. S. 163, the novel, unprecedented, and unpredicted nature of the case was recognized by this Court but the principle of liberal construction was followed (337 U. S. at 181):

> "We recognize that, when the statute was enacted, Congress' attention was focused primarily upon injuries and death resulting from accidents on interstate rail-

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[20] Appendix A, page 1a.

[21] Appendix A, page 2a.

roads. Obviously, these were the major causes of injuries and death resulting from railroad operation. But accidental injuries were not the only ones likely to occur. **And nothing in either the language or the legislative history discloses expressly any intent to exclude** from the Act's coverage any injury resulting 'in whole or in part from the neglect' of the carrier. If such an intent can be found, it must be read into the Act by sheer inference * * *. 'To read into this all-inclusive wording a restriction * * * would be contrary to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act intended by this Court." (Emphasis supplied.)

The most gratuitous statement made by petitioner in its brief is that hazards of life and limb which may be overcome or minimized by the use of safety appliances do not exist in the operation of these vehicles. The necessity for adequate and efficient brakes[22] is too apparent to even discuss: the serious injuries incurred in this case and in the *Martin* case[23] attest to this fact. The absence of automatic couplers when these vehicles are used together, may not involve risk of injury in coupling vehicles, but the dangers inherent in uncoupling when in motion can be very great.[24] These vehicles, running without schedule, would be constantly in danger of being overrun by powerful, fast and heavy equipment should a coupling part and the truck be left upon the track or allowed to run freely backward down one of the many hills and mountains over which the railroads operate. The absence of uniform headlights and rear lights on motor cars operating at night may result in many types of accidents. These are only a few of the many

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[22] 45 U. S. C. 1 and 11.

[23] Infra, page 17.

[24] 45 U. S. C. 2 as interpreted in **O'Donnell**, supra, page 13.

dangers to which men using these vehicles are constantly exposed.

It cannot be doubted that the real and present dangers to men required to use motor cars, hand cars, or push trucks on the railroads are increased materially when the motor cars are used to haul cars or trucks which are not equipped with brakes. For the year 1955, Interstate Commerce Commission Bulletin No. 124[25] reports that motor cars were involved in a majority of 80 accidents which killed 5 and injured 10 men. This included 1 collision, 3 derailments and 76 miscellaneous "train accidents".[26] In the same year, 6 were killed and 14 injured when other locomotives or cars struck hand and motor cars;[27] 34 were injured in "non-train accidents" involving hand cars,[28] and 10 were killed and 326 injured in "non-train accidents" involving motor cars.[29]

Liberal construction of the Acts in the light of their prime purpose, the protection of employees requiring the use of safe equipment, must be extended to these men who daily face the risks pointed out. A contrary construction has never been made.

C.

Every Appellate Court Decision Confirms Coverage.

The consistent holding of the courts below in this case that the statutes were applicable to a motor car pulling a push truck, the vehicles here involved, is not a novel one. In fact, the decision of every appellate court in the United

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[25] In its accident bulletins, the Commission classifies hand car and motor car accidents separately from "train accidents".

[26] Table 64, items 1816 and 1817.

[27] Table 80, item 7057.

[28] Table 90, item (j); table 104A.

[29] Table 90, item (k); table 104A.

States supports the decision. Twenty years ago the Second Circuit Court of Appeals reached the same conclusion on precisely the same facts and this Court denied certiorari:

Hoffman v. New York, N. H. & H. R. Co., 74 F. 2d 227, cert. den. 294 U. S. 715.

In that case a four-wheeled gasoline tractor was used to pull a four-wheel hand car without complying with the Coupler Act (45 U. S. C. 2).[30] One of our most able Circuit Judges, Augustus N. Hand, wrote the opinion holding that the vehicles involved were within the coverage of the statute.

Very recently the applicability of the Safety Appliance Acts to motor cars was before the Courts of Florida in an accident similar to this one. Plaintiff there was operating a motor car which derailed because its brakes failed when he attempted to stop short of a pile of dirt and rock. The plaintiff secured a verdict on the basis that he had shown a violation of Section 11 of the Act.[31] On appeal the defendant argued (1) that a motor car is not a "car" within the meaning of the Act,[32] (2) that a motor car is exempt as a four-wheel vehicle under Section 6, (3) that the Interstate Commerce Commission has never adopted any standards for motor cars and has never prosecuted or even inspected them under the Act,[33] (4) that the legislative history of the Act indicates that the Act was not intended to apply to motor cars.[34] On appeal, the Supreme Court of Florida affirmed the judgment:

Martin v. Johnston, 79 So. 2d 419 (cert. den. 350 U. S. 835).

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[30] Appendix A, page 1a.

[31] Appendix A, page 2a.

[32] Appellant's brief, pp. 9 to 17.

[33] Ibid., pp. 12, 17.

[34] Ibid., pp. 17 to 24. Petitioner's statement (brief p. 26) that the Supreme Court of Florida did not have the legislative history before it, is without basis in fact.

Rejecting these arguments, it said (420):

> "We find nothing in the statutes or the reported decisions to indicate an intention that in the enactment of the above quoted statutes the Congress intended that the word 'car' should be used in a narrow, rather than in a broad, sense. As was said by the Supreme Court of the United States in *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 25 S. Ct. 158 (49 L. Ed. 363), soon after the enactment of the law, 'manifestly the word "car" was used in its generic sense. There is nothing to indicate that any particular kind of car was meant. Tested by context, subject matter and object, "any car" meant all kinds of cars running on the rails * * *. And this view is supported by the dictionary definitions and by many judicial decisions, some of them having been rendered in construction of this act.'
>
> "There being as much reason for requiring the motor car in question to be equipped with efficient handbrakes, to insure its safe operation when propelled under its own power, as there is for the requirement that such a car be equipped with automatic couplers, where it is to be used in connection with a train movement, we have the view that the Safety Appliance Acts are applicable and that we are not authorized to depart from the literal terms of the statute."

This Court denied certiorari (350 U. S. 835) although the petition expressly raised the very point here contended: that a motor car is not a "car" or "locomotive" under the statutes.

Two other appellate decisions dealt with cases involving motor cars: *Chicago R. I. & G. Ry. v. Bernnard*, 275 S. W. 505, involved precisely the same facts as *Martin v. Johnston*, supra. Although the case went off on a matter of pleading, it squarely supports the applicability of the Act to this type of vehicle; in *Dougall v. Spokane, P. & S. Ry. Co.*, 207 F. 2d 843, cert. den. 347 U. S. 904, the decision assumes the applicability of the Act to motor cars and flatcars.

The court below places its finger upon the heart of this case when it says (233 F. 2d at 665; R. 103):

> "In the present case the motor track car was being used to haul another car, i. e., it was functioning as a locomotive and was, therefore, a locomotive within the meaning of the Act. Its actual use controls over its name."

This clear and obvious holding completely demolishes the petitioner's attempt to distinguish the *Hoffman* case and the decision in *U. S. v. Fort Worth & Denver City Ry. Co.*, 21 F. Supp. 916. Although it appeared that in *Hoffman* the four-wheeled gasoline tractor "was frequently used to haul a long line of cars" as petitioner points out, **it was not hauling such cars at the time of the accident there involved but was hauling only a hand car.** Although the crane in the *Fort Worth* case was usually used to load and unload cars it was, at the time involved, pulling other cars. Its position having been so effectively dealt with by the Court below, petitioner now urges legislative and administrative history and "practical considerations" as the basic reasons for reversal.

III.

Administrative Interpretation is Not the Guidepost to Construction.

A.

The Argument is Based upon Fundamental Fallacies.

A basic fallacy which pervades these arguments for reversal is the assumption that the user to which the cars here involved was put was one which was proved to be widespread, usual and customary in the railroad industry. This error must here be exposed, lest misconception arise

from various statements made in petitioner's brief. **Not a single word of evidence in this record proves or even suggests that motor cars are usually used, commonly used or ever used to pull push trucks, not equipped with brakes, on any other railroad.** Respondent stipulated in the District Court than an absent witness would testify, if called, that "hand cars * * * are **capable** of being towed behind railroad motor track cars * *" (R. 78) but **not** that they were in fact generally so used.[35]

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[35] The following statements in petitioner's brief and the inferences sought to be drawn from them as to their uniform use throughout the industry are not based upon the record and are not supported by it:

"They (motor track cars) are used with push trucks to carry maintenance crews and equipment * * *" (page 5).

"Air brakes or a braking system by which the driver of the motor car can cause brakes to be applied on the push truck are not used on vehicles of this type (R. 41, 99, 78)" (page 5).

"Push truck * * * are attached to motor cars with a simple non-automatic coupling device, as the pictures indicated" (pages 5, 6).

"The push truck has been used since the first rails were laid, and the motor track car is simply a push truck propelled by a small gasoline engine" (page 6).

"There are no brakemen on motor track cars and push trucks and no trainmen go between cars to couple or uncouple them. These vehicles are coupled simply by pushing them together by hand. Whether they ever could be equipped with air brakes, automatic couplers and the like is a matter of doubt. So far as is known, none has ever been so equipped" (page 7).

"In the latter part of the 19th century, railroads began to use a gasoline engine to drive the pumps on water service stations, and it was not long before ingenious track maintenance men adapted these engines to their push trucks and hand cars. Soon, almost every maintenance of way section gang had a push car or hand car equipped with a small gasoline engine which had been rigged up by the foreman or one of his gang" (page 11).

"The necessary assumption that this combination of motor car and push truck would normally be operated, in the absence of a train brake system, with a brakeman operating a hand brake on the push truck has no basis in reality" (page 14).

That it would be normally so operated **at all** has no basis in the record.

"* * * it is not likely that a section crew will be able to lift the motor car and the push truck from the tracks" (page 19).

We have here, as we had in the *Hoffman* case, a user of two vehicles or cars by the petitioner which was not the user for which they were constructed or intended. The motor car was created to carry men and equipment, as the long history recited by the Commission clearly indicates. The push truck was created to carry equipment and to be pushed or pulled by hand as its very name clearly indicates. For reasons of its own, and not supported by any custom or practice of the industry, petitioner ordered the use of the combination of vehicles without taking the slightest precaution for the safety of its employes. Petitioner's own expert witness testified that the unbraked push truck would add to the stopping distance of the combination (R. 69, 70).

A similar misconception prevails in the discussion of the attitude of the Commission. Despite the lengthy recital of the Commission's actions in both the petitioner's and the Commission's briefs, at no point is it contended (nor does the record show) that the Commission ever had knowledge that defendant was using this combination of vehicles without adequate braking equipment.

The reports and recommendations of the Commission are cited and quoted at length but no reference at all is made to the only Order of the Commission, which relates to motor cars.[36] The Order of December 14, 1925, specifically states that it is adopting "rules and instructions for the inspection and testing of locomotives by other than steam power which, **for the purposes of this order,** will be distinguished from multiple unit cars and similar self-propelled vehicles designed to carry within themselves freight or passenger traffic." For the purpose of this Order, therefore, the Interstate Commerce Commission defines a locomotive as a self-propelled unit of equipment designed **solely for moving other equipment,** and a motor car, as a self-

[36] It is significant that this was the only Commission Order relied upon by petitioner in the District Court. It was introduced in evidence (R. 81, 82, 83) as Defendant's Exhibit 4. It was urged upon the Court of Appeals (Brief for Appellant, page 19) and in its Petition for Certiorari (page 14). It is now totally ignored by both the petitioner and the Commission.

propelled unit of equipment designed to **carry freight or passenger traffic.** The Order then states that, **for its purposes,** a motor car is not to be considered a locomotive. It is apparent, therefore, that the Commission did not assume to classify the equipment except for the purposes of its Order. Its Order requires certain equipment on vehicles which it **calls locomotives,** but does not require the same equipment on vehicles which it **calls motor cars.** That is the full extent of the applicability of the Order itself. The Commission did not assume to determine what was or what was not a locomotive or a motor car, a task which was beyond the scope of its inquiry at that time.[37]

It should further be pointed out that even for the purpose of the Order itself, a motor car is supposed to carry freight or passenger traffic; **it is not supposed to move other equipment which is the task of a locomotive. In the present case, the motor car was doing the work of a locomotive under the Order, as it was moving other equipment, to wit, the push truck,** and thereby was converted into a locomotive even under the classification of the Order, as the court below has held.

B.

The Commission's Argument is Destroyed by its Own Decision.

We hesitate to question the sincerity of the Interstate Commerce Commission in its position here but we are as-

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[37] We are amazed at the Commission's citation of its own accident reporting classifications (Brief, page 19) as a basis for statutory construction. It is not so naive as to believe that this can bear any weight. In its own recent decision it swept aside the same argument (297 I. C. C. at 192):

> "The definition of a locomotive as contained in such classification is only for accounting and other reporting requirements, and a definition as used for such purposes cannot be construed as also applicable to issues for determination under the Locomotive Inspection Act involving entirely unrelated matter."

founded by the inconsistency of this position with its own action and holding in a comparable situation. It here argues that the terms "cars", "vehicles", and "locomotives" should not be held to include these vehicles because it has not considered them included heretofore. Quite the contrary position was taken by the Commission in *Ex Parte No. 179*, 297 I. C. C. 177. In this proceeding the Commission's authority to prescribe rules governing inspection of electrically operated units and multiple-unit equipment was questioned. The Hudson & Manhattan Railroad Company contended "that its equipment does not fall within the definition of a locomotive and that Congress, in fact, did not intend to confer on the Commission jurisdiction and authority to determine rules and instructions for inspecting and testing of motorcars and electrically operated units designed to carry passengers and operated by a single set of controls" (187). The argument arose from the Commission's Order of October 23, 1953, changing the definition of "locomotive" from that set forth in the Order of December 14, 1925. We have noted that the 1925 Order divided all self-propelled vehicles into two classes: (1) those "designed solely for moving equipment" and (2) those "designed to carry freight or passenger traffic". The first class is called "locomotives", the second "motor cars".[38] When self-operating electrical units designed to carry passengers became prevalent, and the need for regulations recommended itself to the Commission, it amended the 1925 definition so as to abandon this distinction entirely. The Order of October 23, 1953, redefined a locomotive as—

> "A locomotive is a self-propelled unit of equipment designed for moving other equipment and **includes** a self-propelled unit designed to carry freight and/or passenger traffic."

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[38] The very inclusion of this definition may well be thought to indicate an assumption of jurisdiction over the latter class as prerequisite to its refusal to exercise its power thereover.

But the mere fact that the Commission decided to regulate "motor cars" by calling them "locomotives" did not make them "locomotives". Or so at least the Hudson & Manhattan contended before the Commission! The Commission (writing its own answer to petitioner's argument on this appeal) said (191):

> "The amendment (to the Boiler Inspection Act) of June 7, 1924 * * * made the law apply to all locomotives regardless of the power by which they are propelled. By these amendments Congress neither specifically included nor excluded multiple-unit equipment, and its intent in this respect must be gathered from the language used in the act and a comparison made of it with other laws on the same subject. **The language in the act is all-inclusive, and considering its purpose,** which is to promote the safety of employees and travelers upon railroads, **the words 'any locomotive' as used in section 2[39] must be construed as intended to encompass all of the motive equipment of any carrier subject to the act."** (Emphasis supplied.)

Twenty-six pages of argument in the Commission's brief are completely refuted by these few lines. If the Commission did, in fact, have authority under the Act to include motor cars in 1953, that authority did not arise after the accident here involved. It pre-existed the Order of 1953 and this accident and inhered in the language of the Act itself. This is the only legal basis upon which the decision of the Commission itself can rest.

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[39] Boiler Inspection Act, 45 U. S. C. 23, Appendix A, page 3a.

C.

Petitioner is Not Supported by the Commission's Failure to Act, Existence of State Regulations, or the Failure of Congress to Amend the Acts.

An extensive argument is made that the Commission's failure to regulate these vehicles must be accepted by this Court as an interpretation of the meaning of the Act. There is no legal or logical basis for such acceptance. From the standpoint of precedent, this position is indefensible. Non-regulation or non-enforcement does not constitute a binding interpretation of the meaning of a statute.

> "It does not appear that such mere non-enforcement by the agents of the Interstate Commerce Commission, even if knowingly indulged in, could be considered to be acquiescence on the part of the Commission itself."
>
> *United States v. Northern Pac. Ry. Co.*, 121 F. Supp. 397, 402, citing *U. S. v. Southern Pac. Co.*, 60 F. 2d 864.

The argument that the Safety Appliance Acts cannot have effect until implemented by regulations of the Commission has long since been overruled by this Court:

Illinois Cent. R. R. v. Williams, 242 U. S. 462.

And this Court has since said of *Williams:*

> "* * * the teaching of the case is that Commission action under §3 does not exhaust the commands of §2. See also *Southern P. Co. v. Carson* (C. A. 9th Cal.), 169 F. 2d 734, holding a railroad liable under §2 for defects in an independent wooden club used to help turn a brake wheel where the wheel itself complied with the Commission's regulations, which made no mention of the club."
>
> *Shields v. Atlantic Coast Line*, 350 U. S. 318, 322-323.

In the *Shields* case, the Commission filed a brief in support of the respondent, urging the same position it takes here. Its plea was rejected. In the *O'Donnell* case, supra, page 13, a petition for rehearing was filed presenting this same argument. Pages 3 to 14 of that petition recited in detail that the legislative history of the Act proved conclusively that Congress never intended the effect given the Act by this Court and that the Commission for over fifty years had construed the Act to the contrary. The argument was rejected and the petition denied (338 U. S. 945).

Petitioner also argues that the existence of state regulations of motor cars leads to the conclusion that they are not locomotives. The Commission echoes this argument, concluding apparently that an adverse decision here would invalidate state statutes and regulations. This argument is founded upon a basic misconception of the meaning and effect of this Court's decision in *Napier v. Atlantic Coast Line R. Co.*, 272 U. S. 605. Both the petitioner and the Commission read this decision to hold that the mere passage of the Boiler Inspection Act (45 U. S. C. 23) precluded the individual states from dealing with locomotives. A little research would have disclosed the fallacy of this position. In *Napier* the issue was whether the Boiler Inspection Act had occupied the field of regulating locomotive equipment so as to preclude state regulations as to automatic doors to fire boxes and cab curtains. Under the general powers delegated to the Commission by the Act, it had, in fact, adopted complete standards covering the devices and equipment to be used on steam locomotives; i. e., it had actually occupied the field of locomotive equipment by regulating and standardizing the devices required on certain types of self-propelled vehicles which it classified as locomotives. Having done so, this Court held, the state legislatures could not enter the field of equipment on such vehicles. (So also in *Penna. R. Co. v. Pub. Service Com.*, 250 U. S. 566, this Court held that the Commission and the Post Office Department had adopted complete rules for the construction of

mail cars thereby occupying the very field of attempted state regulations.)

The limitations of the rule in *Napier*, however, have been clearly defined by this Court. In the later case of *Terminal Assn. v. Trainmen*, 318 U. S. 1, the power of the Illinois Commerce Commission to direct carriers to provide cabooses for their employees was called into question. It was argued that the Interstate Commerce Commission had been granted broad powers which included the **right** to require cabooses and therefore the State could not trespass in this field. *Napier* was cited as the authority for this holding. Distinguishing *Napier*, this Court pointed out that the Interstate Commerce Commission had never "sought to make any such requirement" and, conceding that "if it should in the exercise of granted power determine whether appellant must provide cabooses, the State would be powerless to gainsay it", nevertheless held that **until the Commission actually acted in the field, the State might reasonably regulate therein.**

In the instant case it cannot be gainsaid that the broad regulatory powers granted to the Commission include the right to regulate the equipment of motor cars. The fact that it has, by specific regulations of December 14, 1925, and October 23, 1953, refused to regulate their equipment has left the various States with full power to make reasonable regulations in that field. As said in the *Terminal Assn.* case, if the Commission should adopt regulations or standards for motor cars, the authority of the States to regulate them will terminate. It is inconceivable that the carriers or the Brotherhoods would register any objection to such regulation.

Petitioner also presses the argument that the "failure of Congress to alter the statutes after a consistent administrative interpretation of long standing creates a presumption in favor of the administrative interpretation". This argu-

ment can have no weight in the instant situation.[40] Quite the contrary is true. In the first place, there exists no expressed administrative interpretation, as has been pointed out. Of even greater moment is that fact that consistent **judicial interpretation** of the statute has held it to be applicable to motor cars and push trucks (cf. decisions discussed, supra, at pp. 16 to 19). If a presumption is to be drawn from the failure of Congress to alter the statutes, it must be based upon its acceptance and approval of the decisions of the Appellate Courts.

Equally without merit is petitioner's argument that the failure of the Commission to seek amendment of the Acts in some manner requires this Court to accept its interpretation. The contrary is undoubtedly true and historically proved. Although the Commission did in fact take the laboring oar to secure the 1896 amendment because of the Circuit Court decision in the *Johnson* case, this Court meanwhile reversed that decision (196 U. S. 1) upon its own liberal interpretation of the Act as written. And, as we have noted, in every novel situation which has arisen, this Court has consistently given a broad and liberal interpretation to the Act in the absence of Commission interpretation and even contrary to its position.

D.

There are No Practical Considerations that Support Petitioner's Argument.

The argument here made that these vehicles **cannot** be equipped with required safety devices is totally without merit. Ignoring for the moment the obvious fact that no necessity is here shown for using motor cars to pull hand

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[40] **Legislative silence and Commission interpretation were dismissed as unpersuasive in Spokane & Inland R. R. v. United States, 241 U. S. 344 and Spokane & Inland R. R. v. Campbell, 241 U. S. 497.**

cars or push trucks, there is no point at all to the railroad's insistence that a 200 pound coupler would have to be installed on these vehicles. If the smaller vehicles weigh a great deal less than 1-200th of a steam locomotive, there is no mechanical reason why an automatic coupler weighing less than 20 pounds could not be made and used. Nor is the use of cumbersome air brake equipment essential; electro-mechanical brakes could easily be devised and would probably be much more efficient. Sill steps, grab irons and brakes on cars which need them for the safety of the men using them are not as ridiculous as the railroad seems to think. On the other hand, if the motor car is used separately, as it is supposed to be used, even the railroads could not reasonably complain of a requirement that it be equipped with such safety appliances as the Commission might require. In the absence of Commission standards the railroad will not only be obliged to conform with the statutes but also to conform with all the statutes of all states in which it operates the car, as we have demonstrated, supra.

This Court has never held that every railroad vehicle must be equipped with useless and ineffective equipment which may be required on other vehicles upon which it would be useful and effective. In *Davis v. Manry*, 266 U. S. 401, this Court held that the provisions of §11 requiring ladders, running boards, handholds or grab irons were limited to cars which require them. In fact, as early as *Southern Ry. Co. v. Crockett*, 234 U. S. 725, this Court clearly stated that the safety appliances required by the Act must be applied "so far as the respective devices and standards are capable of being installed upon the respective vehicles".

IV.

The Section 6 Proviso Does Not Exempt These Vehicles.

A.

Grammatical Meaning of the Proviso.

We come now to the question relied upon by the petitioner in the Courts below: does the proviso of Section 6 exempt a motor car used to pull a push truck because both are four-wheeled vehicles. The proviso of Section 6 reads as follows:

> "*Provided*, That nothing in this Act contained (in sections 1-7 of this title)[41] shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs."[42]

Again, the first question must be what is the normal and sensible meaning of the words of the statute. Let us examine the proviso grammatically. The phrase, "when such cars or locomotives are exclusively used for the transportation of logs", must have a grammatical reference to the prior portions of the sentence in which it appears. The use of the two words, "cars or locomotives", indicates without doubt that it refers to **more than one** of the preceding phrases. The first phrase to which it must refer is that dealing with cars, namely, "4-wheel cars" or "8-wheel standard logging cars". The second phrase is that referring

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[41] As codified, 45 U. S. C. 6, printed in full in Appendix 1a.

[42] Mar. 2, 1893, sec. 6, 27 Stat. 532; amended April 1, 1896, 29 Stat. 85; 62 Stat. 909.

to locomotives, namely, "locomotives used in hauling such trains". Without referring the last clause of the sentence to **both** of the preceding phrases, the purpose of the phrase "when such cars or locomotives" is completely lost.

B.

The Proviso Must be Strictly Construed.

If any principle of statutory construction is here to be applied, it must be the time-honored principle established by Mr. Justice Story in *The United States v. Dickson*, 15 Peters 141, 165:

> "* * * we are led to the general rule of law which has always provided, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof."[43]

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[43] In **Rayonier, Inc. v. United States**, —— U. S. ——, 1 L. Ed. 2d 354, decided January 28, 1957, this Court said (358-359):

> "There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it."

The very argument that the Section 6 proviso exempts the vehicles here involved is an admission of the invalidity of the primary position taken by petitioner and the Commission on this appeal. That which is not covered by a general statute can hardly be excepted from it. As was said in **Arnold v. United States**, 147 U. S. 494, 499:

> "In **Brown v. Maryland**, 12 Wheaton 419, 438, Chief Justice Marshall recognized as 'a rule of interpretation, to which all assent, that the exception of a particular thing from general words proved that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made'."

Dealing with the exemption contained in Section 13 of the Act, the Ninth Circuit Court of Appeals said in *United States v. Atchinson, T. & S. F. Ry. Co.*, 156 F. 2d 457, 458-459:

> "We are not disposed to countenance the interpolation of exceptions not contained in the Safety Appliance Acts. That is the business of Congress. Aside from their lack of authority in the premises, the courts should not be moved by considerations of convenience or practicability to whittle away and eventually nullify the protection afforded by this beneficent legislation."

C.

Every Appellate Court Decision has so Held.

Next let us see what the courts have already said about the Section 6 proviso. No appellate court in the United States has ever excluded a four-wheeled vehicle from the protection of the Acts. In *Hoffman v. New York, N. H. & H. R. Co.*, 74 F. 2d 227, cert. den. 294 U. S. 715, as we have seen, the vehicles involved were a 4-wheeled gasoline tractor pulling a 4-wheeled hand car. The exemption of Section 6 was argued and squarely rejected, the court stating (74 F. 2d 232):

> "The exemptions of Section 6 are expressly limited to logging trains."

The exemption clauses of the Act had earlier been considered by this Court in

Spokane & I. E. R. Co. v. United States, 241 U. S. 344.

There the street railway exception contained in Section 8

was before the Court. Comparing the two, this Court said (350):

> "* * * on the face of the Statute, the object of both provisions was to exempt both the logging and the street railway cars from the operation of the Act only when used for logging on the one hand, and on street railways, on the other, and not to exempt them when not so used."

In *Martin v. Johnston*, 79 So. 2d 419, cert. den. 350 U. S. 835, above referred to and quoted, the Section 6 proviso was argued (appellant's brief, pages 10, 11) but the Supreme Court of Florida did not deem this argument to have sufficient merit even to discuss it. *Chicago, R. I. & G. Ry. v. Bernnard*, 275 S. W. 505, involving precisely the same facts as *Martin v. Johnston*, was decided on a matter of pleading but it squarely supports the applicability of the Act to this type of vehicle. In *Dougall v. Spokane, P. & S. Ry. Co.*, 207 F. 2d 843, cert. den. 347 U. S. 904, the court assumed the applicability of the Act to motor cars and flat cars.

D.

Legislative History Supports the Court Below.

Consideration of the legislative history of the proviso of §6 and its amendment adds nothing to its interpretation except a back-room appreciation of the complete lack of consideration which one Congress may give to the deliberations of another. In the course of considering the 1893 Act, the Senate was told that there were 4-wheeled coal cars in use and requested to exempt them—nothing whatsoever was said about the existence of any other type of 4-wheeled

vehicles.[44] The original proviso was adopted upon this representation and the court below has construed it in accordance therewith. In 1896 the proviso was before the House again; this time coal cars were completely ignored and it was represented that the proviso "was evidently intended to apply to logging trains".[45] Apparently the Congress was little concerned with its predecessor's actual discussions for no further inquiry was made and the House accepted the further statement that "it happens that the cars are of eight wheels and do not come within the exception". Upon this representation the amendment was adopted.

The court below took the view that the original proviso was limited to 4-wheel coal cars and the amendment was limited to logging cars. In the *Hoffman* case, the Second Circuit Court of Appeals took the view that the proviso as amended is "expressly limited to logging trains".[46] In either view there is no basis for the argument, logically, semantically or historically, that the proviso as it now reads exempts the vehicles here involved.

E.

There is No Exemption under Section 23.

Petitioner's argument as to the Section 6 proviso also ignores completely the fact that it does not apply at all to

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[44] Despite the extensive history of maintenance of way equipment set forth at length in petitioner's brief, Senator Blodgett, in offering an amendment to Section 6 (24 Cong. Rec. 1477) said:

"I do not know that the cars containing but four wheels are used in any other service in the country except the coal service."

[45] This misconception of the Congress is conceded by the Commission in its Brief, page 14. As stated by Senator Wolcott (28 Cong. Rec. 3129) the proviso was amended for clarification, "the effect of which is merely to provide that trains used **exclusively** for logging may be relieved from the provisions of the Act."

[46] This is the view also expressed by this Court in the **Spokane** case, supra, page 32. The Commission apparently concurs in the view taken by the Court below, brief pages 2-3.

the Boiler Inspection Act (45 U. S. C. 23).[47] If the motor car is a "locomotive" within the meaning of the Act—and it is clear that it must be so held, at least where it is used as such—it comes within the provision of Section 23. This section was enacted in 1911, 36 Stat. 913, and amended by the Acts of Mar. 4, 1915, 38 Stat. 1192, and the Act of June 7, 1924, 43 Stat. 659. Congress was then fully cognizant of the text of the exemption clause in Section 6 enacted in 1893 and amended 1896; had it intended to do so, it would have referred to the exemption clause and excluded four-wheeled vehicles from the provisions of this section. The express failure of Congress to include any exemption clause in Section 23 constitutes an affirmation that Section 23 applies to **"all locomotives, parts and appurtenances thereof"**, including any which might be exempted by Section 6.

The motor car certainly was not "in proper condition and safe to operate in the service to which the same (is) put" "without unnecessary peril to life or limb" when it was used to pull a truck which had no brakes whatsoever and when the motor car itself had no brake control over the following vehicle.

This language of the Act is simple and clear. It includes not only the work for which the locomotive was designed but also that to which it is put with the employer's knowledge and acquiescence or at its direction: *Edgington v. Southern Pacific Co.* (Cal.), 55 P. 2d 253.

> "The words 'unnecessary' and 'peril' are words of every day usage and common understanding. As used in this Act we see no mystery in them. 'Unnecessary', means that which is not required by the usual circumstances. 'Peril', means an exposure to injury or destruction. 'Unnecessary peril', as used in the Act, means an exposure to injury or destruction which is not required by the usual circumstances of the particular duty the employee is to perform, but which is

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[47] Set forth in full, Appendix A, page 3a.

an exposure to injury over and above that which is usually, ordinarily or necessarily incidental to the performance of the particular duty."

Banta v. Union Pac. R. Co. (Mo.), 242 S. W. 2d 34, 40.

Regardless of the interpretation given to the Section 6 proviso, Section 23 applies to all vehicles used as locomotives and itself fully justifies the instruction of the District Judge in this case.

CONCLUSION.

The application of the Safety Appliance Acts to the vehicles here involved is required by the language of the Act, recognized principles of statutory interpretation and by established judicial interpretation. There is no justification for reading ambiguity into its language and searching through the grab-bag of administrative interpretation or lack thereof in order to narrow the effectiveness of this legislation.

If the writ is not dismissed as having been improvidently granted, the judgment should be affirmed.

Respectfully submitted,

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APPENDIX A.

Text of Statutes Involved.

45 U. S. C. §1. It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose. 27 Stat. 531.

45 U. S. C. §2. It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. 27 Stat. 531.

45 U. S. C. §6. Any common carrier engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of sections 1-7 of this title, shall be liable to a penalty of $100 for each and every such violation, to be recovered in a suit or suits to be brought by the United States attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such United States attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper United States attorneys information of any such violations as may come to its knowledge: *Provided*, That nothing in sections 1-7 of this title shall apply

to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs. 27 Stat. 532; 29 Stat. 85; 62 Stat. 909.

45 U. S. C. §8. The provisions and requirements of sections 1-7 of this title shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section 6 of this title, or which are used upon street railways. 32 Stat. 943.

45 U. S. C. §11. It shall be unlawful for any common carrier subject to the provisions of sections 11-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: *Provided*, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose. 36 Stat. 298.

45 U. S. C. §23. It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28-30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. 43 Stat. 659.